No. 4093

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLANCHE CASCADEN, as administratrix of the estate of DAVID H. CASCADEN, deceased, (substituted plaintiff for DAVID H. CASCADEN and BLANCHE CASCADEN, as guardian of the estate of DAVID H. CASCADEN, an insane person),

Plaintiff in Error.

vs.

GEORGE WEBER,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

R. F. ROTH,
Attorney for Defendant in Error.

ROBERT W. JENNINGS,
Of Counsel.

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Errors in Plaintiff's Statement.

On page 4 of plaintiff's brief occurs this statement: "But the latter note was given plaintiff in error merely as security for the payment of the $3000 note". This is plaintiff's contention but the contention is not supported by any evidence.

And on page 5 of plaintiff's brief occurs this statement:

> "But that note was given the defendant in error to indemnify him against liability on a note of one Frank Allberg against defendant in error and one David Petree."

The evidence shows that the $2000 note was given for money owed by Petree to Weber and that Cascaden was a comaker. There is no evidence that the note was *not* to be paid *unless or until* Weber paid the Allberg note.

Points, Argument and Authorities.

(1)

THE FIRST CAUSE OF ACTION.

Neither party made a case on this cause of action in strict accord with his pleadings. The variances however do not confuse the essential question involved. That question was "Is there any liability from Weber to Cascaden for or on account of anything done by Cascaden re the $3000 note"?

We maintain that Weber is not and never was liable to Cascaden. There is evidence—written evidence, signed by Cascaden himself—evidence absolutely undisputed and undisputable—which impelled a verdict for defendant in error on the first cause of action; and, that being so, errors in instructions, if any such errors there were, were harmless. The evidence we refer to is contained in the Minutes of the Fairbanks Beverage Company of date June 25, 1918. (Tr. p. 128.)

It will be recalled that the note mentioned in the complaint ($3000 note) was given October 31, 1917, by Petree and Weber to the Farmers' Bank for the purpose of obtaining from said bank the second $3000 of cash needed to effectuate the purchase by Petree and Weber of the Tanana Bottling Works then owned by one Allberg. (Tr. pp. 26, 42.) Petree and Weber became the Tanana Bottling Works. Cascaden had no interest therein. The note was signed by Petree and Weber only and the due date was April 30, 1918, and the note was secured by certain property which later passed to the Fairbanks Beverage Company.

The Fairbanks Beverage Company was organized on April 27, 1918. (Tr. p. 36.) Petree was president and Cascaden was vice-president (Tr. p. 67), and Weber was secretary and treasurer. These three were the sole directors and the only stockholders of the Beverage Company. (Tr. p. 34.)

When the said note of Petree and Weber to the Farmers' Bank became due (to-wit on April 30, 1918) they were unable to meet it and, Cascaden then signing it, it was extended for 60 days (or until June 30, 1918. (Tr. p. 28.) As the last mentioned date approached means had to be devised by the Beverage Company that the note be met, because it was secured by a mortgage on a portion of the Beverage Company's property; and, as the Beverage Company was also in need of working capital, a special meeting of its directors was held

on June 25, 1918. The minutes of that meeting (signed by all the directors—Cascaden included) speak for themselves. Those minutes read as follows (italics ours):

> "Minutes of Special Meeting of the Board of Directors of the Fairbanks Beverage Company, Inc., June 25, 1918.
>
> At a special meeting held at the office of the Fairbanks Beverage Co., Inc., on June 25th, 1918, there being present *all* of the directors of said company, *to-wit: David Petree, David H. Cascaden and George Weber;* the holding of said meeting unanimously agreed to and notice thereof, as well as notice of the objects of said meeting having been expressly waived, the following proceedings were had, to wit:
>
> *After a discussion of the finances of the company* and it appearing that a note for three thousand ($3,000.00) dollars and interest due to the Farmers' Bank of Fairbanks, Alaska, secured by a mortgage *on a portion of the property of the Fairbanks Beverage Co., Inc.,* has been due since April 30th, 1918, and that, *in addition thereto* said company *needs ready money* to the extent of about five thousand ($5,000.00) dollars, for the purpose of extending and carrying on its business and liquidating its bills payable, *David H. Cascaden expressed his willingness to loan this company said necessary money* aggregating about eight thousand twenty-five ($8,025.00) dollars, at the banking rate of 12% interest per annum, for a reasonable time, *upon condition* that the said company execute to said Cascaden its promissory notes *secured by mortgage upon the assets of said corporation.*
>
> Thereupon it was moved by David Petree, seconded by George Weber and *unanimously* carried, that said *offer* be accepted and that this

company, by its President and Treasurer, be authorized and directed to make, execute and deliver to the said Cascaden its promissory *note, or notes,* aggregating the sum of five thousand ($5,000.00) dollars, bearing interest at 12% per annum for such time as may be agreed upon, secured by a first mortgage *upon all of the assets of said company.* And *in order to obtain said loan* and execute said security that the officers of this company be further authorized and directed to make, execute and deliver to the said Cascaden its promissory note for the amount of three thousand ($3,000.00) dollars and accumulated interest *on said Farmers' Bank debt,* secured by a second mortgage upon the assets of this company *for the purpose of paying and liquidating the note and mortgage of three thousand ($3,000.00) dollars and interest due to the Farmers' Bank of Fairbanks, Alaska.* And, further, that action be *forthwith* taken to carry out the objects of this resolution.

There being no other business to come before this meeting it was moved, seconded and carried that this Directors' meeting be adjourned.

DAVID PETREE.
(Seal) DAVID H. CASCADEN,
GEORGE WEBER."

(Defendant's Exhibit 7, Tr. pp. 128-9-30.)

From these minutes—signed by Cascaden himself and absolutely uncontradicted and unimpeached—four things are apparent, viz:

(I) That the $3000 note was secured by a mortgage "on a portion" of the property of the Beverage Company.

(II) That on that account the Beverage Company was directly interested in the payment and liquidation of the $3000 note and (with the consent of all parties except the bank which was not interested in who paid said note, so long as same was paid) elected to treat the note as its own indebtedness, at least to the extent of borrowing money wherewith to pay and liquidate it; and that it voted to pay and liquidate the note.

(III) That Cascaden offered (and the Beverage Company accepted the offer) to loan to the Beverage Company the money *needed* for the purpose of paying and liquidating the said note, and *to loan* that money *for that express purpose*—he taking a note of the Beverage Company and a mortgage *on all the assets of the Beverage Company* to secure the note which the Beverage Company agreed to give him for the loan he agreed to make to the Beverage Company.

(IV) That the officers of the Beverage Company are to execute these "minutes" *forthwith.*

Now after this agreement had been made, but on the same date, to wit: June 25, 1918 (five days before maturity), the said note of $3000 to the Farmers' Bank is paid by Cascaden, the vice-president of the Beverage Company—that is, Cascaden is the person who handed the money to the Farmers' Bank.

The essence of the transaction is simply this: that instead of handing to the Beverage Company

the money wherewith to pay and liquidate the note to the Farmers' Bank (as he had agreed to do) and letting the company pay the note when due (which would have been the natural and logical way to execute the agreement), he himself ("in a huff" (Tr. pp. 29, 30)) hands the money to the bank *(before the note is due) in payment and liquidation* of the note, receives back the note from the bank, has the mortgage securing the note *released* (Tr. p. 56; Mack, Tr. p. 66; Exhibit 6, Tr. p. 128), demands the Beverage Company's note, as per agreement (Tr. p. 30), receives the said last mentioned note (and later reduces it to judgment). (Tr. pp. 87 to 120 incl.)

There is no evidence that he paid the $3000 note in his capacity as accommodation maker. The evidence is all to the contrary, for on paying it he had the mortgage securing it marked *paid and released* and he said to the Beverage Company "You will make out a note to me and a mortgage". (Tr. p. 30.) If he had paid as accommodation maker he would not have had the $3000 mortgage released; nor, if he had paid as accommodation maker, would he have had any "call" to demand a note and mortgage from the Beverage Company.

Cascaden had no right of action against Petree or Weber.

Cascaden's contract with the bank, in signing the $3000 note, was, of course, that of a note maker with a payee; but his contract with Petree and

Weber, his comakers, was not on the note at all; and whatever inchoate right of action he may have had against Petree and Weber by reason of signing the note as a comaker for their accommodation that right of action would not be on the note but on the contract of indemnity which the law implies from the relation between the accommodating party and the accommodated party. The obligations of this relation are not worked out through the note.

8 C. J. Sec. 424 (2) p. 270.

Said contract of indemnity is that Petree and Weber will indemnify Cascaden if he should be compelled to pay the note *at or after maturity;* it is not that they will indemnify him if he voluntarily, or at the instance of some one else, pays the note before it is due.

8 C. J. Sec. 423, p. 270 (1) second subsection;
Shannan v. Langhorn, 9 L. A. Ann. 526;
Stark v. Alford, 49 Tex. 260.

As accommodation maker, then, Cascaden had no right to pay the note five days, or any length of time, before it was due, for that was not his contract with Petree and Weber.

In paying the note before it was due Cascaden's position, so far as Petree and Weber is concerned, was that of an entire stranger—his action was purely voluntary.

If a stranger, without being asked so to do by the makers of a note, voluntarily *pays* said note, he

has no recourse against the makers; different, of course, if the stranger *purchases* the note, but there is here no pretense that Cascaden *purchased* the note—on the contrary, the allegation and the evidence is that the note was *paid and discharged.*

Thus neither Petree nor Weber was ever liable to Cascaden for or on account of the payment of the Farmers' Bank note. Such liability could not have arisen until the note should have been due and it could not have arisen even then unless Cascaden should have paid it in his capacity as accommodation maker; but before the note became due it was paid and liquidated by the Beverage Company by and through Cascaden and the note was delivered to the company's vice-president (Cascaden) and the mortgage securing the note was marked paid and released of record.

In paying the note and securing release of the mortgage Cascaden acted not as an accommodation maker compelled to pay for his comakers; on the contrary he was paying for purposes of his own, viz. for the purpose of earning the Beverage Company's note and mortgage—he earned said note and mortgage before there was any call on him to do so under his agreement with the Beverage Company, but only the Beverage Company could complain of that and it was satisfied—he earned the Beverage Company's note and mortgage by doing as he agreed to do, i. e. by lending to the Beverage Company the money wherewith to pay and liquidate the

note,—only, instead of directly handing to the Beverage Company the amount of the agreed loan he handed it to the bank and thus did for the Beverage Company the very thing *it* was to do with the money which it was to get from him, as per agreement with him, and the Beverage Company ratified this "too previous" action by executing its note and mortgage as it had agreed to do, and Cascaden has reduced that note and mortgage to judgment.

Plaintiff would have it that Cascaden is entitled to double credit, to-wit, first as against Petree and Weber for paying the note, and, second as against the Beverage Company for the money loaned by him to it wherewith he paid the note for it.

Defendant's Citations Are Not Applicable.

On pages 29, 30, 31 of plaintiff's brief, cases are quoted from to the effect that notes for which renewal or security notes have been taken are not discharged unless the renewal notes or security notes have been paid or the original note surrendered. We do not question those cases, but they are not applicable here—because there is here no question of renewal note or security note; on the contrary the so-called original note has been *paid and liquidated; not renewed, not secured but paid and liquidated, by and for the Beverage Company through Cascaden, it's vice-president, who agreed to lend it the money for that express purpose and did so loan it.*

When the Farmers' Bank note was paid it was delivered by the bank to Cascaden because Cascaden was the man who handed the cash to the bank and the bank was not interested in who paid the note nor in what became of it. Cascaden retained possession of the note it is true, but it was his duty either to deliver it to Beverage Company or to destroy it. Neither Petree nor Weber could demand the paid note, because neither had paid it. If any one has a right of action against Petree or Weber it is the Beverage Company—not Cascaden.

II.

THE SECOND CAUSE OF ACTION.

This cause of action arises on an unpaid note for $500 dated June 25, 1918, due December 25, 1918, made, executed and delivered by defendant to plaintiff. (Tr. p. 8.) No defense is pleaded, but defendant sets up an overbalancing counterclaim. (Tr. p. 13.)

III.

THE COUNTERCLAIM.

The counterclaim pleaded arises on a note dated February 5, 1918, for $2000, due July 1, 1918, made, executed and delivered by plaintiff and David Petree to defendant.

The court instructed the jury that they must find for defendant on this note. Said instruction is assigned as error. We submit that said instruction was entirely proper under the evidence.

Plaintiff pleaded in reply (1) That there was no consideration for the note (Tr. p. 18, Par. IV); (2) That the consideration has failed. (Tr. p. 19.)

We do not controvert the cases cited by plaintiff to the effect that when, in an action on a note between payee and maker, a want of or failure of consideration is pleaded *and evidence is introduced* showing or tending to show such want of consideration or failure of consideration, the case is for the jury; but it is elementary that, in such action the well known presumption as to the existence of a good consideration prevails, if there be *no evidence* of a want or failure of consideration.

Now in this case there is *no evidence* of a want or failure of consideration.

(1) No evidence of want of consideration.

Weber (defendant) swore that this note was given to him by Petree for a bona fide indebtedness of Petree to him and that Petree induced Cascaden to join him as comaker; that the note is due and has not been paid. (Tr. pp. 35, 36, 37.) This evidence is entirely uncontradicted.

(2) No evidence of failure of consideration.

Plaintiff also pleaded that the consideration had failed, alleging:

"(1) That prior to the 5th day of February, 1918, David H. Cascaden, George Weber, and David Petree had purchased from one Frank Allberg certain property in the town of Fairbanks, Alaska, and the purchasers paid on account of the purchase price the sum of approximately $6,000.00, and there remained due to said Allberg the sum of approximately $3,000.00.

(2) That George Weber, defendant in said action, fearing that he might be compelled to pay the balance of the said purchase price of said property to said Allberg in the absence of David H. Cascaden and David Petree, and as a protection in the event that he should be compelled to make such payment, procured from said David H. Cascaden and David Petree the promissory note [17] described in paragraph three of defendant's answer, which said promissory note was to be paid by said David H. Cascaden and David Petree to said Weber, in the event that Weber was compelled to pay to said Allberg the $3,000.00 balance of the purchase price on the property purchased from said Allberg and described above, but not otherwise. That said note was intended to reimburse said Weber in the event he paid the proportion of the balance of the purchase price that was properly payable by said Cascaden and said Petree.

(4) That said Weber never paid to said Allberg the balance of said purchase price of said property, and the consideration for said note failed, and said note is without consideration and is void, and plaintiff herein David H. Cascaden is not now, and never has been, liable for the payment of any part or portion thereof." (Tr. p. 19.)

There is no evidence to sustain the allegation that *Cascaden,* Weber, and Petree purchased any property from Frank Allberg or that Cascaden owed Allberg any part of the $3000 unpaid purchase money for the bottling works—on the contrary the undisputed evidence is that only Weber and Petree were Allberg's debtor and that Cascaden had nothing to do with the purchase from Allberg. (Tr. p. 27, bottom; p. 41, bottom; p. 53, top.) There is no evidence "that said note was intended to reimburse said Weber in the event he paid the portion of the balance of the purchase price that was properly payable by said Cascaden and said Petree".

Plaintiff relies on the evidence of Mrs. Cascaden that "last Spring" (Spring of 1922) Weber told her that

> "Two thousand was to secure George in 1918, February 6th, when he left for outside, against balance of three thousand note due Ahlberg. Firm was to pay Ahlberg three thousand, but has nothing to show". (Tr. p. 71.)

Weber denies that he made any such statement (Tr. pp. 45-46) and, considering the fact that Petree did owe him $2000 (Tr. pp. 35-6-7) and that Cascaden owed him nothing before he signed the note and owed nothing to Allberg and that Petree's legitimate share of the indebtedness to Allberg was $1500 (not $2000) such a statement would have been absurd in the extreme; and it is exceedingly unlikely that it was made.

But granting that the statement was made and granting that it was true, it affords no evidence showing or tending to show a failure of consideration. The alleged statement is this,

> "Two thousand was to secure George in 1918, February 6th when he left for outside against a balance of three thousand note due Ahlberg." (Tr. p. 71; Plaintiff's Brief, p. 23.)

Counsel argue as if the statement was to the effect that the $2000 note was *not to be paid unless Weber "on his trip to the outside in February 1918"* should at that time be compelled to pay the entire sum called for by the Allberg note; but we submit that there is nothing in the statement as alleged to have been made which is at all susceptible of the construction counsel would put upon it. There is not one word in the alleged statement about the *payment* of the Allberg note—on the contrary the alleged statement is that the $2000 note was to secure Weber against the Allberg note. The consideration then could not fail until the liability of Weber on the Allberg note is at an end. That liability was not at an end, for the undisputed evidence is that the Allberg note was, at the time of the commencement of the action and at the time of the trial, an outstanding obligation against Weber. Petree left the country owing Weber and has since died. (Tr. p. 64.) Petree's liability on the Allberg note was $1500 (one-half). That note has never been paid. (Tr. p. 42, 10th line from bottom.) Weber says (undisputed) "But the note is up to me to be paid

now." (Tr. p. 47, bottom.) It was in the hands of a lawyer at Fairbanks at the time of the trial. (Tr. p. 42, 12th line from bottom.)

Counsel would have it that the Allberg note "was surrendered to him (Weber) and was in the possession of his attorney during the trial". (Plaintiff's Brief, p. 23.) There is absolutely no evidence that the Allberg note was surrendered to Weber or is or ever was in his possession. He says that the note is in possession of Mr. Roth (Tr. p. 42) but he does not say or intimate that Roth is holding note *for him*. Roth is a practicing attorney at Fairbanks and it does not appear that Weber is his only client or that he is attorney for Weber except in the matter of the action at bar. For all that appears Roth is holding the note as attorney for Allberg or for some other client or obtained it from some other attorney. There is certainly no evidence that Roth holds the note as attorney for Weber. As the note was never paid and as there is no evidence that Roth is not Allberg's attorney to collect that very note or that he did not get the note from some other attorney or person, the inference (which is sought to be conveyed) that the note is in defendant's possession by virtue of being in Roth's possession has no foundation in the evidence on which it can rest—and especially is this true when it is remembered that Weber testified that "the note is up to me to be paid now" and there is no contradiction on that point.

But irrespective of this: The note is an unconditional *written* promise to pay at a time certain. The consideration was the indebtedness of Petree to Weber and this was a good consideration. No *parol* evidence can graft upon the *written* contract any condition as to time of payment other than that which appears in the writing.

This is substantive law, not a mere rule of evidence (22 C. J. p. 1075 and cases cited in Note 50) and hence it is immaterial whether such evidence was or was not objected to,—for the law does not allow such evidence to have any probative force. (Pittcairn v. Phillips Hiss Co., 125 Fed 110-113.)

Hence the lower court was correct in directing a verdict on the counterclaim.

We respectfully submit that the judgment should be affirmed.

Dated, San Francisco,
November 26, 1923.

R. F. Roth,
Attorney for Defendant in Error.

Robert W. Jennings,
Of Counsel.